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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK,
DEPARTMENT OF FINANCE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Questions Presented

Section 627 of the Edge Act, 12 U.S.C. § 627, provides that an international bank organized under that Act (an "Edge Bank") "shall be subject to tax by the State within which its home office is located." Although Federal Reserve Board regulations have always permitted Edge Banks to operate across state lines—at first through "agencies" and since 1979 through "branches"—Congress has never consented to the taxation of Edge Banks except by their home-office states.

The primary questions in this case are (1) whether the City of New York's Financial Corporation Tax, N.Y.C. Admin. Code §§ R46-37.1 *et seq.*, as applied to an Edge Bank having its home office in Illinois and a branch in New York, conflicts with Section 627 of the Act and (2) whether the tax is repugnant to the Supremacy Clause of the United States Constitution for lack of the requisite consent of Congress.

As the predicate for its decision of the first of these issues, the Court below held that Section 615(b) of the Act prohibits Edge Banks from having branch offices within the United States. That holding raises the further question whether the Federal Reserve Board regulations purporting to authorize such branches are valid.

Statement Pursuant to Rule 28.1

Appellant has moved for an order permitting its Rule 28.1 listing to be filed under seal. Copies of the listing are herewith submitted to the Court for its *in camera* review.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Statement Pursuant to Rule 28.1	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision, Statutes and Regulations Involved	3
Statement	3
The Questions Are Substantial	9
Conclusion	21
APPENDIX:	
Opinion of the New York Court of Appeals	A1
Order of the Appellate Division	B1
Findings of the City of New York, Department of Finance	C1
Remittitur of the New York Court of Appeals	E1
Notice of Appeal	E1
Relevant Constitutional, Statutory and Regulatory Provisions	F1

TABLE OF AUTHORITIES

PAGE

Cases

Albernaz v. *United States*, 450 U.S. 333 (1980) .. 16
Apfel v. *Mellon*, 33 F.2d 805 (D.C. Cir.), *cert. denied*, 280 U.S. 585 (1929) 11
Bank of California v. *Richardson*, 248 U.S. 476 (1919) 11, 12, 15, 16
Cheney Bros. Co. v. *Massachusetts*, 246 U.S. 147 (1918) 15
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 10
Continental Bank Int'l v. *City of New York, Dep't of Finance*, 69 N.Y.2. 281 (1987) 1
Continental Bank Int'l v. *City of New York, Dep't of Finance*, 117 A.D.2d 1023, 499 N.Y.S.2d 298 (1st Dep't 1986) 1
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282 (1921) 2
Diamond Nat'l Corp. v. *State Board of Equalization*, 425 U.S. 268 (1976) 11
Department of Employment v. *United States*, 385 U.S. 355 (1966) 18
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 16
First Agricultural Nat'l Bank v. *Owensboro*, 392 U.S. 339 (1968) 9, 10, 11, 18, 19
Hobbie v. *Unemployment Appeals Comm'n*, 107 S.Ct. 1046 (1987) 2-3
M'Culloch v. *Maryland*, 4 Wheat. 316 (1819) ..2, 9, 19
Owensboro Nat'l Bank v. *Owensboro*, 173 U.S. 664 (1899) 4, 10, 11

PAGE

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 13

Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) 19

United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 20

United States R.R. Retirement Board v. *Fritz*, 449 U.S. 166 (1980) 16

Western Air Lines, Inc. v. *Board of Equalization*, 107 S.Ct. 1038 (1987) 2

Statutes

U.S. CONST. art. VI, cl. 2 ..... 1, 2, 7, 8, 18

International Banking Act of 1978, Pub. L. No. 95-369, § 3, 92 Stat. 607, 608 (1978) 6, 13

Act of June 26, 1934, ch. 750, Title I, § 18, 48 Stat. 1222 4

Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132 .. 4

Act of July 22, 1932, ch. 522, § 13, 47 Stat. 735 .. 4

Act of July 17, 1916, ch. 245, Title I § 26, 39 Stat. 380 ..... 4, 17

Act of Dec. 23, 1919, ch. 6, § 7, 38 Stat. 258 4

R.S. § 5219 ..... 4, 11, 12, 15, 16, 17

12 U.S.C. § 531 17

12 U.S.C. § 548 8

12 U.S.C. § 611 *et seq.* 2

12 U.S.C. § 613 5

12 U.S.C. § 615(a) 4

PAGE

12 U.S.C. § 615(b) 5, 6, 8, 9, 12, 13, 21

12 U.S.C. § 616 4

12 U.S.C. § 627 ..... *passim*

28 U.S.C. § 1257(2) 2, 3

28 U.S.C. § 2403(b) 3

Administrative Regulations

N.Y.C. Admin. Code § R46-37.1 *et seq.* 1

N.Y.C. Admin. Code § R46-37.3(a) 7

N.Y.C. Admin. Code § R46-37.5.3(a)(1) 7

Regulation K—International Banking Operations, FRB Circular No. 8590 (June 20, 1979) 6

Regulation K—International Banking Operations, § VIII, (March 23, 1920) 5

Regulation K—International Banking Operations, § X (March 23, 1920) 5

Legislative Materials

Hearing Before the Committee on Banking and Currency of the House of Representatives on S. 2472, 66th Cong., 1st Sess. 33 (1919) (Statement of Hon. William P.G. Harding, Governor, FRB) .. 13

Senate Comm. on Banking, Housing and Urban Affairs, *Board of Governors of the Federal Reserve System Report on State and Local Taxation of Banks,* 92d Cong., 2d Sess. (Comm. Print 1972) 18

58 Cong. Rec. 4969 (1919) 17

58 Cong. Rec. 7855 (1919) 4, 20

PAGE

58 Cong. Rec. 7856 (1919) 15, 20

58 Cong. Rec. 7856-57 (1919) 12

58 Cong. Rec. 7857 (1919) 5, 14

58 Cong. Rec. 8108 (1919) 15

Other Authorities

Rule 28.4(c), Rules of the United States Supreme Court 3

E. Isaacs, *An Analysis of Doing Business*, 25 Colum. L. Rev. 1018 (1925) 15

Note, *A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches*, 51 Fordham L. Rev. 991 (1983) 7

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-

CONTINENTAL BANK INTERNATIONAL,

Appellant,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Appellee.

Jurisdictional Statement

This is an appeal from a judgment of the Court of Appeals for the State of New York entered February 19, 1987 upholding the validity of the New York City Financial Corporation Tax (N.Y.C. Admin. Code §§ R46-37.1 *et seq.*) against the contention that, as applied to appellant, such tax conflicts both with 12 U.S.C. § 627 and with the Supremacy Clause of the United States Constitution under principles heretofore established by this Court.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A) is reported at 69 N.Y.2d 281 but has not yet appeared in the unofficial reports. The order of the Appellate Division, First Department, confirming appellee's administrative determination without opinion (Appendix B) is reported at 117 A.D.2d 1023 and 499 N.Y.S.2d 298. The Findings of appellee's Formal Referee (Appendix C) are unreported.

Jurisdiction

This is a proceeding challenging, on federal statutory and constitutional grounds, the validity of the City of New York's Financial Corporation Tax as applied to appellant, an international bank chartered under the Edge Act, 12 U.S.C. §§ 611 *et seq.* As stated in its brief in the Court below, appellant's contention is that " . . . the City of New York's Financial Corporation Tax, as applied to an Edge Bank having its home office outside the State of New York, is repugnant both to 12 U.S.C. § 627 and to the United States Constitution under principles authoritatively established by the Supreme Court" (p. 51), referring to *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and its progeny which, as the Court below noted, are "grounded on the Supremacy Clause" [A6]. The Court below rejected both contentions and concluded that "the City's tax must be upheld" [A10].

The judgment appealed from was entered on February 19, 1987, and no rehearing was sought.[1] Appellant's notice of appeal was filed with the clerk of the New York Court of Appeals on May 11, 1987. Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1257(2). *See Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Western Air Lines, Inc.* v. *Board of Equalization,* 107 S.Ct. 1038 (1987); *Hobbie* v. *Unemployment Appeals*

[1] Appellant did, however, make a timely motion to amend the remittitur so as to state explicitly that the Court had considered and upheld the validity of the Financial Corporation Tax against the contention that, as applied to appellant, it is repugnant to both Section 627 and the Supremacy Clause. In its motion papers, appellant stated its belief that such was the intended meaning of the Court's opinion, and in opposing the motion appellee did not controvert that interpretation except to quibble over appellant's proposed reference to the Supremacy Clause. On May 7, 1987 the Court below denied the motion without explanation.

Comm'n, 107 S.Ct. 1046, 1048 n.5 (1987) (appeal lies under 28 U.S.C. § 1257(2) even if state court has not been explicit in its rejection of the federal constitutional claim raised by appellant).

Since 28 U.S.C. § 2403(b) may be applicable, a copy of this Jurisdictional Statement is being served on the Attorney General of the State of New York pursuant to Rule 28.4(c) of the Rules of this Court.

Constitutional Provision, Statutes and Regulations Involved

Section 627 of the Edge Act, 12 U.S.C. § 627, provides as follows:

> "Any corporation organized under the provisions of this subchapter [12 U.S.C. §§ 611 *et seq.*] shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations."

Additional constitutional, statutory and regulatory provisions relevant to this appeal are set forth in Appendix F.

Statement

The Edge Act, a 1919 amendment to the Federal Reserve Act, provides for the federal incorporation of specialized banks empowered to engage in international and foreign banking and financial operations under the supervision of

what is now the Board of Governors of the Federal Reserve System (the "FRB" or "Board"). Edge Banks are authorized to provide a broad range of banking services, including the receiving of deposits and the making of loans, 12 U.S.C. § 615(a) [F3-F5], although their operations within the United States are limited to those that the FRB deems "incidental" to their international and foreign business, *id.* § 616 [F6-F7]. The Edge Act's congressional supporters characterized it as "a new national banking act for banks specializing in foreign trade." 58 Cong. Rec. 7855 (1919).

In Section 627 of the Act, Congress addressed the subject of state and local taxation of Edge Banks and their shares. Like previous statutes governing state and local taxation of federally chartered banks,[2] Section 627 is rooted in the long-standing constitutional principle that the states have no power to tax banks created under the authority of the United States, or the shares of such banks, without the express permission of Congress. *E.g., Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899). Section 627 permits an Edge Bank to be taxed "by the State within which its home office is located," and further permits the *shares* of an Edge Bank to be taxed "as the personal property of the owners or holders thereof" without reference to the bank's home-office state or other geographic limitation. Except as provided in Section 627, Congress has never permitted the states to tax either Edge Banks or their shares.

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[2] *E.g.,* R.S. § 5219 (national banks); Act of Dec. 23, 1913, ch. 6, § 7, 38 Stat. 258 (federal reserve banks); Act of July 17, 1916, ch. 245, Title I, § 26, 39 Stat. 380 (federal land banks and associations and joint-stock land banks). Similar statutes enacted after 1919 include Act of July 22, 1932, ch. 522, § 13, 47 Stat. 735 (federal home loan banks); Act of June 13, 1933, ch. 64, § 5, 48 Stat. 132 (federal savings and loan associations); and Act of June 26, 1934, ch. 750, Title I, § 18, 48 Stat. 1222 (federal credit unions).

Section 613 of the Act requires every Edge Bank to designate in its organization certificate "the place in the United States where its home office is to be located" as well as "the place or places where its operations are to be carried on" [F3]. Although Section 615(b) permits an Edge Bank to have "branches or agencies" abroad with FRB approval [F5], the Act contains no express provision either authorizing or prohibiting branches and agencies in the United States. The legislative history, however, shows that, while there was some opposition to domestic branching, the Act's supporters insisted—and no one denied—that Edge Banks would need to maintain domestic agencies if they were to provide proper service to customers not located near a banking center. *E.g.*, 58 Cong. Rec. 7857 (1919).

In March 1920, three months after the Edge Act became law, the FRB promulgated Regulation K to govern the organization and operation of Edge Banks. In its original version, Regulation K prohibited domestic branches but permitted domestic "agencies . . . for specific purposes, but not generally to carry on the business of the Corporation" (Reg. K, §§ VIII, X, March 23, 1920) [F10].[3] Neither Regulation K nor the Act itself imposed any geographic limitation on these agencies, and thus Edge Banks were authorized from the outset to operate across state lines.

In 1979, in response to a congressional mandate to eliminate or modify any regulatory restrictions not required by statute that unnecessarily restrict Edge Banks in competing with foreign-owned banking institutions or that

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[3] For reasons stated below (*post*, p. 13 n.9), the Court of Appeals was clearly in error in inferring from the FRB's 1920 regulations that the Board "apparently interpreted" Section 615(b) "to prohibit domestic branches" [A2-A3].

impede the attainment of the Act's purposes,[4] the FRB undertook a major revision of Regulation K. The revised regulation permitted Edge Banks to establish domestic branches for the first time. Noting that Edge Banks "are not subject to Federal law that limits the power of banks to branch across State lines," the Board said that "the new authority [to branch] makes it more efficient and less costly for Edge Corporations to enter and operate at new locations" (FRB Cir. No. 8590, June 20, 1979).

The FRB's action led not only to the establishment of numerous Edge Bank branches, but to the creation of many new Edge Banks and the rapid growth of existing ones. By September 30, 1986, according to FRB data, there were 83 Edge Banks operating 92 domestic branches and having $16.9 billion in assets.

Not surprisingly, state and local taxing authorities in most of the jurisdictions where Edge Bank operations are concentrated—133 (or 76%) of the 175 Edge Bank offices in the United States are in California, Florida, Illinois, New York and Texas—promptly sought to tax these newly established branches. The vast majority of such branches (88 of the 92 domestic branches in existence on September 30, 1986) belong to Edge Banks having their home offices in other states. Appellee, like the taxing authorities in California, Illinois, Florida, New York State and several other banking-center jurisdictions, took the position that it is entitled to tax such branches notwithstanding Section

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[4] International Banking Act of 1978, Pub. L. No. 95-369, § 3, 92 Stat. 607, 608 (1978). Although the 1978 Act also effected certain amendments to the Edge Act (the only substantive amendments made to date), neither the amendments nor the direction to the FRB to revise its regulations addressed the subject of branching by Edge Banks. Specifically, and significantly, the 1978 Act made no change in Section 615(b) of the Edge Act, which the Court below construed as a prohibition of domestic branching.

627 and notwithstanding the absence of congressional consent to such taxation.[5] Appellant commenced the present litigation in order to challenge that position.

Appellant is an Edge Bank having its home office in Chicago and branches in a number of United States cities, including the City of New York. For the years 1980 (the year of its incorporation) and 1981, appellant filed New York City Financial Corporation Tax returns on which it reported taxable income but stated that no tax was due. After an audit, appellee made an administrative determination that appellant is subject to the City's Financial Corporation Tax and that for the years in question it is liable for $6,075,329.35 in taxes on its "entire net income" attributable to its New York branch.[6] Appellee expressly rejected appellant's contention that, as applied to an Edge Bank having its home office outside New York State, the tax conflicts both with Section 627 of the Edge Act and with the principle, established by this Court under the Supremacy Clause of the United States Constitution, that federally chartered banking institutions are not subject to state and local taxation without the express consent of Congress [C15-C16].

After paying the tax under protest, appellant sought judicial review of this determination, reiterating the contentions it had unsuccessfully advanced in the administrative proceeding. The Appellate Division confirmed appellee's

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[5] *See* Note, *A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches,* 51 Fordham L. Rev. 991, 998-99 n.35 (1983).

[6] Section R46-37.3(a) of the City's Administrative Code defines "entire net income" as the taxpayer's "entire taxable income" reportable for federal tax purposes, subject to certain adjustments [F9]. For the years 1980 and 1981, the "basic tax" (except for certain thrift institutions) was at the rate of 13.823%. *Id.* § R46-37.5.3(a)(1).

determination without opinion [B1], and the Court of Appeals affirmed, holding that the City's Financial Corporation Tax, as applied to appellant, "must be upheld" [A10].

Without analyzing the language of Section 627, the Court of Appeals asserted that it has "facial ambiguity" and that it contains "no plain . . . prohibition of taxation" [A5]. The Court then disposed of the Section 627 issue with a syllogism: Because "the Edge Act did not authorize branch offices within the United States"—citing Section 615(b)—and because "some" legislators said they opposed branching, "it stands to reason that the authorization of full nondiscriminatory taxation by the home office state . . . was not an expression of immunity for then nonexistent branch offices" [A5]. The Court made no attempt to explain why Congress would specifically authorize taxation by the home-office state if it did not intend such taxation to be exclusive.

Turning to the Supremacy Clause, the Court recognized that "almost from their inception, national banks were considered Federal instrumentalities exempt from tax" [A6], but without attempting to identify any constitutionally significant difference between national banks and Edge Banks, the Court held that Edge Banks are not entitled to the same constitutional protection that national banks and all other federally chartered banks have long been accorded [A9].[7]

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[7] The Court's view of the *constitutional* issue appears to have been influenced by the fact that, since 1976, national banks have been subject to general state and local taxation *by statute*. 12 U.S.C. § 548. The statute in question, however, is entirely consistent with the established constitutional principle that national banks are not subject to state and local taxation except with the consent of Congress; the statute merely provides the requisite congressional consent.

It is significant that when Congress consented to the general taxation of national banks, it did not give equivalent consent to the taxation of Edge Banks but instead left Section 627 of the Edge Act as originally enacted in 1919.

The Questions Are Substantial

The resolution of the questions in this case will directly affect the tax liability of every Edge Bank having a domestic branch outside its home-office state. Since there are 88 such branches belonging to 32 Edge Banks, these questions are of substantial importance not only to the Edge Bank industry, but to the tax authorities in most of the major banking centers.

Of at least equal importance is the question—raised and decided *sua sponte* by the Court below as the predicate for its decision of the Section 627 issue—whether Section 615(b) of the Edge Act prohibits domestic branches. The Court of Appeals' holding that such a prohibition is implicit in Section 615(b) casts doubt on the validity of the FRB regulations that, since 1979, have expressly authorized such branches. If the 92 presently existing domestic branches are unlawful because established in reliance on an invalid FRB regulation, the consequences for the many Edge Banks that maintain such branches, and for their customers, will be serious indeed.

The decision below also calls in question the reach and continuing validity of the constitutional principle, first announced in *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and approved by this Court as recently as *First Agricultural Nat'l Bank* v. *State Tax Comm'n,* 392 U.S. 339, 340 (1968), that "the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks." *Ibid.* The Court below not only declined to follow this principle, but applied its antithesis: "Absent congressional action," it asserted, "a State's power to tax may not be denied . . . ." [A10].

Apart from the practical and doctrinal importance of the issues presented in this case, we submit that the decision below was in error for the following reasons:

1. In considering Section 627 of the Edge Act, the Court below ignored the basic rule that "the starting point for interpreting a statute is the language of the statute itself" and that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Court below recognized that Section 627 "authorizes nondiscriminatory taxation . . . by the home office State" [A5], but it made no attempt to explain why Congress would expressly authorize taxation by the home-office state if it did not intend that authorization to be exclusive. Indeed, the Court attributed no meaning whatever to the statutory direction that an Edge Bank shall be taxable "by the State within which its home office is located"; in effect, it read the quoted words out of the statute. In so doing, the Court *inter alia* destroyed the careful distinction Congress drew between an Edge Bank as a corporate entity, which only the home-office state is authorized to tax, and an Edge Bank's *shares*, which are taxable without geographic limitation.

2. In asserting that Section 627 contains "no plain . . . prohibition of taxation" [A5], and that "absent congressional action . . . a State's power to tax may not be denied" [A10], the Court below inverted, by a full 180 degrees, the long-established principle that "the States are without power, unless authorized by Congress, to tax federally created . . . banks." *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340. This principle antedated the Edge Act, *see Owensboro Nat'l Bank* v. *Owensboro,* 173 U.S. 664, 668 (1899), and there can be no doubt that Section 627 was drafted in light of it: The office of Section 627 was to provide, with specified limitations, the authorization without which the states could not tax Edge Banks at all. It follows that when Congress

authorized taxation by the home-office state, it intended that authorization to be exclusive.

For precisely the same reason, this Court repeatedly construed the equivalent provision of the National Bank Act (R.S. § 5219, former 12 U.S.C. § 548) as prohibiting all taxation that it did not specifically authorize. *Owensboro Nat'l Bank* v. *Owensboro, supra; Bank of California* v. *Richardson,* 248 U.S. 476 (1919); *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra; Diamond Nat'l Corp.* v. *State Board of Equalization,* 425 U.S. 268 (1976). Through successive amendments, R.S. § 5219 was always framed as an authorization of specified forms of state and local taxation rather than as a prohibition. At the time of the *Owensboro* and *Bank of California* decisions, for example, Section 5219 said only this about the taxation of national banks:

> "Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed" [F8].

This Court nevertheless held that Section 5219 "furnish[ed] the exclusive rule governing state taxation." *Bank of California* v. *Richardson, supra,* 248 U.S. at 483. As the Court said about a later version of R.S. § 5219, it is "abundantly clear" that the section "marks the outer limit within which States can tax national banks." *First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 345.

Because the National Bank Act is *in pari materia* with the Edge Act, *Apfel* v. *Mellon,* 33 F.2d 805, 807 (D.C. Cir.), *cert. denied,* 280 U.S. 585 (1929), because Section 627 is to Edge Banks what R.S. § 5219 was to national banks, and because (as shown below) Congress drafted Section

627 with specific advertence to R.S. § 5219 as interpreted by this Court, it is evident that Congress intended Section 627 to be construed in the same way that this Court had construed R.S. § 5219—as "the exclusive rule governing state taxation." *Bank of California* v. *Richardson, supra,* 248 U.S. at 483. Indeed, unless Section 627 constitutes an "exclusive rule," it has no ascertainable meaning whatever.[8]

3. The Court below rejected appellant's reliance on Section 627 because, "inasmuch as the statutory scheme of the Edge Act did not authorize branch offices within the United States (*see* 12 U.S.C. § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong. Rec. 7856-7857 (1919)), it stands to reason that the authorization of full nondiscriminatory taxation by the home-office state (12 U.S.C. § 627) was not an expression of immunity for then nonexistent branch offices" [A5]. The fallacy of this reasoning is threefold.

First, in authorizing taxation of an Edge Bank by "the State within which its home office is located," Congress clearly contemplated not only that an Edge Bank might have more than one domestic office (otherwise there would be no need to refer to its "home" office) but that it might have offices in more than one state (otherwise there would be no need to refer to its home-office "State").

Second, the Act has never prohibited Edge Banks from having domestic branches. The Court below based its con-

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[8] In its administrative ruling [C14] and in its brief in the Court below, appellee advanced the untenable suggestion that the only purpose of Section 627 is to prohibit tax discrimination. Because Congress would hardly prohibit discrimination by the home-office state while leaving all other states free to discriminate without any statutory restriction whatever, the Court below understandably refused to accept that suggestion. It conspicuously failed, however, to offer any alternative theory as to the meaning of Section 627.

trary conclusion solely on a negative inference tendentiously drawn from Section 615(b), which authorizes branches and agencies abroad but which says nothing about branches and agencies in the United States. The FRB has never drawn any such inference, however, for although Section 615(b) was part of the original Edge Act and has never been amended, the Board has expressly authorized domestic agencies since March 1920 (only three months after the Edge Act became law) and has authorized domestic branches since 1979.[9] For sixty-seven years, therefore, the FRB has authorized Edge Banks to conduct multistate operations notwithstanding Section 615(b). The FRB's interpretation of the statute it is responsible for administering—and that in large measure it drafted [10]—"should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (footnote omitted).

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[9] The Court below manifestly erred in asserting that in 1920 the FRB "apparently interpreted" Section 615(b) "to prohibit domestic branches" [A2-A3]. The Board said no such thing, in 1920 or ever. To the contrary, by authorizing domestic agencies at the same time that it prohibited domestic branches, the Board unmistakably evidenced its view that Section 615(b) prohibits neither, for as the section refers to branches and agencies in correlation, it cannot be read as a prohibition of one but not the other.

Moreover, the Board could not have authorized domestic branching in 1979 if it had read Section 615(b) as prohibiting such branching. The 1978 Edge Act amendments (International Banking Act of 1978, Pub. L. No. 95-369, § 3, 92 Stat. 607, 608 (1978)) neither repealed Section 615(b) nor purported to authorize domestic branching by Edge Banks, and we do not read the opinion below as suggesting otherwise.

[10] *Hearing Before the Committee on Banking and Currency of the House of Representatives on S. 2472*, 66th Cong., 1st Sess. 33 (1919) (Statement of Hon. William P.G. Harding, Governor, FRB). The bill as drafted by the FRB contained precisely the same language as now appears in Section 615(b).

Third, the Court's statement that the possibility of domestic branching was "decried" by some legislators [A5] does not support its conclusion that Edge Banks were never intended to operate domestically outside their home-office states. The legislative history leaves no doubt that Congress expressly anticipated that Edge Banks would have offices—agencies if not branches—in a number of different states in order to provide proper service to customers not located near a banking center. For example, the Chairman of the House Banking and Currency Committee, which reported the Edge bill to the House (and which drafted what became Section 627), said to a Representative from Iowa:

> "If the gentleman is going to have people in Iowa properly served by these banks, they would want an agency there.
>
> ". . . If the gentleman does not want his people properly served by a local agency they would have to go to New York every time they did business . . . . These financial institutions either are to have agencies or else his people will have to go to Wall Street every time they do business with them." 58 Cong. Rec. 7857 (1919).

No one took issue with the Chairman's statement that Edge Banks would need domestic agencies if they were to carry out their intended mission, and no one suggested that such agencies would be forbidden by the proposed legislation.

Thus the Court of Appeals' crucial assumption—that Congress expected every Edge Bank to operate strictly within the boundaries of its home-office state so that no question of multistate taxation could ever arise—is contrary not only to the statutory language and the FRB's long-

standing administrative interpretation, but to the legislative history as well.[11]

4. The legislative history also makes clear that Section 627 was patterned on the equivalent provision of the Nationl Bank Act (R.S. § 5219) which, only a few months earlier, this Court had construed as "the exclusive rule governing state taxation" of national banks. *Bank of California* v. *Richardson, supra,* 248 U.S. at 483.

The Edge bill's proponents said that they had drawn extensively on the National Bank Act. *See, e.g.,* 58 Cong. Rec. 7856 (1919) ("We have put in a good many restrictions taken from or suggested by the national bank act, or from the Federal reserve act"). The language of what is now Section 627 originated in the House Banking and Currency Committee, one of whose members explained its meaning in these terms:

> "[H]ere is what the committee did in writing the taxing feature of this bill: The Supreme Court of the United States and the different courts have interpreted this language. It is copied verbatim from the national banking act. In other words, we are going to make these corporations and their stock to be taxed exactly in the same manner as national banks and their stock are taxed. We thought that would save a great deal of controversy." 58 Cong. Rec. 8108 (1919).

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[11] The decision below necessarily rests on the further, unarticulated assumption that no question of taxation can ever arise unless the taxpayer maintains a full-fledged branch in the taxing jurisdiction. That assumption is incorrect. Since long before 1919, it has been well established that (absent statutory and constitutional constraints such as are applicable to Edge Banks) a corporation is subject to taxation by any state in which it does business. *See* the cases collected in E. Isaacs, *An Analysis of Doing Business,* 25 Colum. L. Rev. 1018, 1037-1040 (1925). Doing business through an agency, or an office of any other kind, is clearly sufficient to permit taxation. *See Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147 (1918).

While this statement somewhat exaggerates the similarities between the two statutes, it nevertheless provides clear and direct evidence that the authors of Section 627 intended it to be construed in the same way that R.S. § 5219 had only recently been construed in *Bank of California* v. *Richardson* —as the "exclusive rule" governing state taxation of Edge Banks.

The Court below brushed aside all of the extensive congressional references to the National Bank Act with the assertion that they "appear to have arisen from a mistaken notion that national banks were subject to State tax" [A6]. As noted, the language now appearing in Section 627 was drafted by the House Banking and Currency Committee, undoubtedly with the aid of its professional staff. There is no evidence whatever that the members of the Committee and its staff—or indeed, that more than a handful of legislators—labored under "a mistaken notion that national banks were subject to State tax." That there were a few misstatements in the course of the floor debates, all by congressmen having no special responsibility for the taxation provision of the bill, is neither surprising nor meaningful. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976) ("Remarks . . . other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight"); *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981) ("It is not a function of this Court to presume that 'Congress was unaware of what it accomplished,'" quoting *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980)).

5. Nor is the decision below supported by the Court of Appeals' ambiguous statement that "Congressional debate indicated a purpose to subject Edge Act banks to State taxation" [A5-A6]. If the Court meant merely that Congress

did not intend to immunize Edge Banks from all state and local taxation, the statement is correct—Section 627 expressly authorizes taxation by the home-office state—but question-begging. But if the Court meant that Congress intended Edge Banks to be subject to taxation outside their home-office states, the statement is wholly without support. The Court's only citation [A6] was to a portion of the Senate debate (58 Cong. Rec. 4969 (1919)) concerning a taxation proposal materially different from the provision ultimately enacted. The present Section 627 was drafted by the House Banking Committee only *after* the Senate had passed its version of the Edge bill. The Senate subsequently acquiesced in the House version with a change not here relevant. What various Senators previously said about taxation of Edge Banks, therefore, sheds little if any light on the meaning of Section 627.

6. If Congress had indeed intended Edge Banks to be subject to unrestricted state and local taxation, it surely would have expressed that intention with unmistakable clarity not only in the congressional debates but in the statute itself. In 1919, all federally chartered banks, without exception, were subject to state and local taxation to only a very limited degree. The national banks, the federal reserve banks and the federal land banks, for example, were subject to real-estate taxes but were otherwise wholly tax exempt.[12] For Congress to have subjected Edge Banks to unrestricted state and local taxation would have represented an abrupt and radical change in a long-established congressional policy regarding taxation of federally created banks. There is nothing in the legislative history, let alone

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[12] R.S. § 5219 (national banks); 12 U.S.C. § 531 (federal reserve banks); Act of July 17, 1916, ch. 245, Title I, § 26, 39 Stat. 380 (federal land banks).

in the statute itself, to indicate that Congress intended any such major policy change.[13]

7. For a hundred and sixty-eight years this Court has consistently adhered to the principle, grounded in the Supremacy Clause of the United States Constitution, that federally chartered banks are subject to state and local taxation only to the extent permitted by Congress. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n, supra,* 392 U.S. at 340 (1968). In *Department of Employment* v. *United States,* 385 U.S. 355, 360 (1966), the Court observed that this principle is "beyond dispute."

This principle does not, of course, assure tax immunity for federally chartered banks, but it does assure that they will not be subject to a particular tax until Congress has had an opportunity to consider the effect of that tax and has determined that its imposition will not be detrimental to the paramount federal interest. Because Congress actively legislates in the banking field and maintains standing committees in both Houses to monitor banking affairs and to propose new legislation when needed, *First Agricultural*

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[13] The long-standing legislative policy of immunizing federally chartered banks from most state and local taxes reflected a number of complex and interrelated considerations. *See generally* Senate Comm. on Banking, Housing and Urban Affairs, *Board of Governors of the Federal Reserve System Report on State and Local Taxation of Banks,* 92d Cong., 2d Sess. (Comm. Print 1972). In the case of an Edge Bank, several considerations militate in favor of designating a single state as the exclusive taxing authority, including simplicity, ease of administration and minimization of compliance costs. *Id.* at 48, 61. Uncertainties about potential tax liabilities and concern about compliance burdens could exert an undesirable influence over an Edge Bank's business decisions, including its decision whether to transfer certain of its operations abroad. Congress may also have considered some limitations on Edge Banks' tax liability as necessary to foster their growth and to enhance their competitive position in international banking and finance.

Nat'l Bank, supra, 392 U.S. at 341, the application of this principle can hardly be deemed an undue burden on state and local governments, as is demonstrated by Congress' repeated enlargement, over the past sixty-five years, of the states' power to tax national banks (but, significantly, not their power to tax Edge Banks).

This Court has never suggested that this principle applies exclusively to banks organized under the National Bank Act. Indeed, the principle was first established nearly fifty years before there was a National Bank Act, *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819), and it has survived fundamental changes in both the National Bank Act and the nature and functions of the national banks themselves. This Court has recognized the applicability of this principle to other types of federally chartered banks. *Smith* v. *Kansas City Title & Trust Co.,* 255 U.S. 180, 212 (1921) (federal land banks and joint-stock and land banks). This Court has never held, or even intimated, that the states are empowered to tax *any* type of federally chartered bank except with the express permission of Congress.

The Court below acknowledged that Congress has never consented to the taxation of Edge Banks except by their home-office states [A5], but it held that such congressional consent is unnecessary. "Absent congressional action," the Court said, "a State's power to tax may not be denied" [A10]. The Court thus turned the long-established principle on its head.

Without making any attempt to identify constitutionally significant differences between Edge Banks and national banks, the Court below accorded them a wholly different constitutional status. There is no rational basis for distinguishing Edge Banks and national banks for constitutional purposes. As noted, Congress conceived of the Edge Act as "a new national banking act for banks specializing

in foreign trade," 58 Cong. Rec. 7855 (1919), and many of the provisions of the Edge Act were "taken from or suggested by the national bank act," *id.* at 7856. Like national banks, Edge Banks are empowered to provide a broad range of banking services, including such quintessential banking services as receiving deposits and making loans. The most important difference between the two is that national banks, like state-chartered banks, are empowered to engage in general domestic banking, whereas the domestic operations of Edge Banks must have a nexus with their international and foreign operations. Thus Edge Banks, unlike national banks, operate entirely within a sphere in which the federal interest is predominant if not exclusive. It would be anomalous to accord a lesser degree of constitutional protection to Edge Banks, which were created to further foreign trade and other specifically federal interests, than to national banks, whose business may be distinctly local in nature.

The Court below declined to follow the well-developed body of law dealing with the tax status of federally chartered banks, and instead relied on cases involving federal licensees, federal contractors and the Red Cross [A7-A9]. In so doing, the Court ignored the "unique" and "distinctive" characteristics of commercial banks and the fact that such banks play a "key role in the national economy" and are "critical to the Nation's welfare." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 326, 372 (1963). Whatever the present status of the "federal instrumentality" doctrine in other contexts, there remains ample justification for the long-standing rule that banks operating under federal authority shall be subject to state and local taxation only after Congress has had an opportunity to evaluate the consequences of such taxation and has given its affirmative consent. The Court of Appeals' refusal to apply that rule to Edge Banks was arbitrary and unsupportable.

Conclusion

We submit that in upholding the validity of the New York City Financial Corporation Tax, the Court below misconstrued Section 627 of the Edge Act, unjustifiably departed from this Court's decisions permitting state and local taxation of federally chartered banks only with the express consent of Congress, and erroneously held that Section 615(b) of the Edge Act prohibits domestic branching notwithstanding FRB regulations expressly permitting such branching. The questions presented by this appeal are both substantial and of public importance.

Respectfully submitted,

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May 20, 1987

APPENDIX A

Opinion of the New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

In the Matter of
CONTINENTAL BANK INTERNATIONAL,

Appellant,

v.

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

Edward W. Keane, Willard B. Taylor, H. Rodgin Cohen, & Theodore Edelman, NY City, for appellant.

Frederick A.O. Schwarz, Jr., NYC Corporation Counsel (Joseph V. Hamilton, Edith I. Spivack, Gale Zarecko, & James F. Eller of counsel) for respondent.

Jo-Ann Horn, Los Angeles, Security Pacific Intnl Bank; Richard C. Pugh, NYC, PNC Intnl Bank; Michael G. DeAngelis, San Francisco, Bank America Intnl. amici curiae.

OPINION

TITONE, J.:

The question before us is whether an international bank chartered by the Federal Government pursuant to the Edge

Act (12 USC §§ 611-632)[1], having a home office in another state and a branch office in New York City is immune from New York taxation. Inasmuch as we conclude that Edge Act banks are not Federal instrumentalities entitled to constitutional immunity from State tax and Congress has not clearly prohibited such a tax, we hold that Edge Act bank branches are not immune from nondiscriminatory State taxation.

I.

In 1919, Congress authorized the incorporation of international banks to be chartered by the Federal Government (12 USC §§ 611-632, [Edge Act]) in response to a perceived need to supply international credit and to secure foreign trade markets for domestic exports (Note, *Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches,* 51 Fordham L Rev 991, 995). Edge Act banks were to provide general banking services for international transactions, establish overseas branches, receive deposits in the United States only when incidental to international business transactions and invest in the stock of certain other corporations engaging in business abroad (12 USC § 615).

The Federal Reserve Board, the regulating authority, apparently interpreted the authorization of Edge Act bank branches and agencies in "foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be

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[1] Edge Act (§§ 611-632) banks were authorized by Congress to provide general banking services for international transactions. A fuller discussion of the nature of these banks begins in section I, *infra*.

approved by the Federal Reserve Board" (12 USC § 615 [b] to prohibit domestic branches. Thus, in 1920, the Board promulgated a regulation prohibiting them (reg K at 12 CFR 211.6[a][1978]). As a result of this regulatory posture, petitioner's parent corporation, Continental Illinois National Bank and Trust Company, owned three separately incorporated Edge Act banks with home offices in New York, Miami and Houston.

Through the International Banking Act of 1978, Congress amended the Edge Act in a general attempt to expand the powers of Edge Act banks to mobilize and apply resources to aid in an increase of American trade. The act also contained a specific instruction to the Federal Reserve Board to "review and revise its rules, regulations, and interpretations . . . to eliminate or modify any restrictions, conditions, or limitations" which inhibited the bank's competitive position in international finance (92 US Stat 608). In response to this general mandate, the Board revised Regulation K (12 CFR 211.4[c], 44 Fed Reg 36007 [1979]) to allow Edge Act banks to establish branch offices within the United States.

Petitioner is a corporation which was organized under the Edge Act in 1980, with its home office in Chicago, Illinois. In 1980, petitioner established its New York City branch office and, since then, petitioner has established branch offices in a number of large cities throughout the United States. When petitioner was incorporated, the parent's separately incorporated Edge Act banks were liquidated and replaced by branch offices of petitioner.

While the Edge Act banks were separately incorporated in each State, the banks did not dispute the right of the City of New York to tax the corporations. Section 627 of the Edge Act clearly authorizes such State taxation of an Edge

Act bank by the State in which its home office is located.[2] Upon the advent of the Edge Act bank domestic branch office, however, petitioner challenged the City's power to tax branch offices and refused to pay respondent's Financial Corporation Tax.[3] Respondent determined that petitioner owed deficiencies, penalties and interest, for the periods of September 1, 1980 to December 31, 1980 and January 1, 1981 to December 31, 1981, in the total amount of $6,075,329.35.

Petitioner commenced this proceeding pursuant to CPLR article 78 challenging respondent's ability to tax a branch office of an Edge Act bank. The proceeding was transferred to the Appellate Division, First Department, by the Supreme Court, New York County (CPLR 7804[g]). The Appellate Division confirmed the determination, without opinion. Petitioner then appealed to this court on constitutional grounds (CPLR 5601[b][1]). We now affirm.

II.

Petitioner urges that 12 USC § 627 reflects a Congressional intent to prohibit taxation of these new branch

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[2] Section 627 provides: "Any corporation organized under the provisions of sections 611-631 of this title shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporation shall also be subject to tax as the personal property of the owners or holders thereof in the same manner and to the same extent as the shares of stock in similar State corporations.

[3] The City of New York imposes a financial corporation tax in the following terms: "For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof" (Administrative Code of the City of New York § R46-37.1[a]).

offices of Edge Act banks. Alternatively, petitioner argues that the Edge Act banks are Federal instrumentalities like national banks, and, therefore, are not subject to State taxation absent express Congressional authorization. For the following reasons, neither of these contentions is meritorious.

A.

It is beyond dispute that Congress has the power to grant or withhold immunity from tax it deems necessary to further the purposes of Federal legislation (*Washington* v. *United States,* 460 US 536, 546; *United States* v. *New Mexico,* 455 US 720, 737; *Carson* v. *Roane-Anderson Co.,* 342 US 232, 234; Tribe, American Constitutional Law, § 6-28, at 391; 1 Rotunda, Nowak, Young, Constitutional Law, § 3.3, at 211). Although 12 USC § 627 authorizes nondiscriminatory taxation of Edge Act banks by the home office State, there is no plain authorization or prohibition of taxation by States of branch offices. Petitioner asks us to conclude that this omission was an expression of Congresional intent to prohibit taxation of the branches. We reject this argument and, instead, examine the historical setting of section 627 to determine Congress' intent in view of the statute's facial ambiguity with respect to State taxation of branch offices.

Inasmuch as the statutory scheme of the Edge Act did not authorize branch offices within the United States (*see,* 12 USC § 615[b]) and the possibility of such offices was decried by some of the original enactors (58 Cong Rec 7856-7857), it stands to reason that the authorization of full nondiscriminatory taxation by the home office State (12 USC § 627) was not an expression of immunity for then nonexistent branch offices. Instead, Congressional

debate indicated a purpose to subject Edge Act banks to State taxation (58 Cong Rec 4969). It is true, as petitioner notes, that some of the debators analogized to the treatment of national banks, but their comments, read in context, appear to have arisen from a mistaken notion that national banks were subject to State tax (*see, e.g.*, 58 Cong Rec 4969, 8108; Note, *Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches*, 51 Fordham L Rev 991, 1002-1003). Moreover, Congress' failure to amend 12 USC § 627 to expressly permit States to tax Edge Act bank branch offices after the act was amended by the International Banking Act of 1978 is not instructive. Since the enactment permitted the Federal Reserve Board to design a mechanism to accomplish this and it was not until 1979 that the Federal Reserve Board amended Regulation K allowing branch offices, Congress' inaction in 1978 cannot be interpreted as an expression of immunization of branches from State taxation. In short, an intention of Congress to deny the State's power to tax Edge Act bank branches cannot be inferred from the language of the statute, which is at best ambiguous on that subject, or from the surrounding debates which indicate only an intent to subject Edge Act banks to State taxation.

B.

The remaining question is whether Edge Act banks are Federal instrumentalities because of their similarity to national banks and, thus, immune from State taxation. Almost from their inception, national banks were considered Federal instrumentalities exempt from tax (*M'Culloch* v. *Maryland*, 4 Wheat [17 US] 316). The dispute spawning the *M'Culloch* doctrine, grounded on the supremacy clause (US Const, art VI, cl 2), involved a Maryland tax imposed

upon banks not chartered by the State's Legislature which placed the Second Bank of the United States in an inferior position to State banks. Noting that "the power to tax involves the power to destroy" (*id.*, p 431), Chief Justice Marshall, writing for a unanimous Court, concluded that States did not have the power to tax the Federal Government or its instrumentalities to the limits of the States' discretion. After *M'Culloch,* national banks survived numerous attacks on their State tax-exempt status (*see, e.g., Owensboro Natl. Bank* v. *Owensboro,* 173 US 664).

When the Federal Reserve Board took over many of the governmental functions of the national banks, once again, the banks' tax-exempt status was questioned (*Agricultural Bank* v. *Tax Commn.*, 392 US 339). The Court specifically declined to reach, as unnecessary, the issue whether today national banks should be considered nontaxable as Federal instrumentalities, because of pertinent legislation in the banking field (*id.*, p 341). Thus, the recent tax-exempt status of national banks rested on a decision by Congress that they should not be taxed by the States. Moreover, effective in 1976, Congress removed this exemption (12 USC § 548). The argument that Edge Act banks are Federal instrumentalities because they are analogous to national banks, is, therefore, problematic.

While Congress may expressly designate an entity exempt from tax (*see, Agricultural Bank* v. *Tax Commn.*, 392 US 339, 341, *supra; Graves* v. *New York ex rel. O'Keefe,* 306 US 466, 476), a Court may also conclude that a body is a Federal instrumentality constitutionally immune from State taxation. The Supreme Court has recently expressed that tax immunity is appropriate only in the narrow instance "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the

Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned" (*United States* v. *New Mexico*, 455 US 720, 735, *supra*). In *Department of Employment* v. *United States* (385 US 355), the Court concluded that the Red Cross was such an instrumentality and not subject to State tax. While the Court then stated that here was no precise test for a Federal instrumentality, the decisive features noted were that Congress chartered the Red Cross subject to governmental supervision and regular audit, that the principal officer and 7 of 49 governors were appointed by the President and that the organization was indispensable to the workings of the Armed Forces, the provision of disaster relief from the Federal Government to the States and the performance of the nation's commitments pursuant to treaties (*id.*, p 359). Of equal importance were the factors that the Red Cross received substantial material assistance from the United States Government and that the President and Congress acted in reliance on the Red Cross' status as an arm of the Government (*id.*, pp 359-360; *see also, Standard Oil Co.* v. *Johnson*, 316 US 481).

In contrast, corporations whose only function was to service governmental atomic research centers for their management, procurement and maintenance needs were held not to be Federal instrumentalities in *United States* v. *New Mexico* (*supra; see also United States* v. *Boyd*, 378 US 39). The essential nature of these functions to the Federal Government is beyond question. However, the Supreme Court specifically stressed that the professional interests of the contractors and the Federal Government were not congruent (455 US, p 740). The contractors profit seeking separated them sufficiently from the Government that State taxation

was considered inoffensive to the notion of Federal supremacy (*id.*, p 741).

To determine whether Edge Act banks are a Federal instrumentality, a virtual arm of the Government, therefore, it is necessary both to weigh those factors found determinative in *Department of Employment* v. *United States* (*supra*, pp 358-359) and to consider, generally, whether those factors demonstrate that the banks are so closely connected with the Government that they cannot realistically be viewed as separate entities (*United States* v. *New Mexico*, 455 US 720, 735, *supra*). While it is true that Edge Act banks are chartered by the Federal Government and subject to strict Federal regulation, those characteristics alone are not enough to lead to a conclusion that they should be immune from tax (*see, Broad Riv. Power Co.* v. *Query*, 288 US 178; *Railroad Co.* v. *Peniston*, 18 Wall [85 US] 5). There is a difference between the strong Federal hand in the internal leadership structure of the Red Cross (*Department of Employment* v. *United States, supra*) and mere regulatory supervision common to industries from broadcasting to drug manufacturing. Edge Act banks receive no financial assistance from the Federal Government (*id.*, p 359). The Federal Government does not rely on Edge Act banks to perform a traditionally governmental act (*id.*, pp 359-360). Rather, the Government relies upon the banks' separate profit motivation which propels the banks toward a mutually satisfactory end. It is this parting of the purpose (*United States* v. *New Mexico, supra*) and the lack of nearly all of the traits found determinative in *Department of Employment* v. *United States (supra)* that lead us to conclude that Edge Act banks are not Federal instrumentalities entitled to constitutional immunity from tax.

III.

Absent congressional action or the clearest constitutional mandate, a State's power to tax may not be denied (*United States* v. *New Mexico,* 455 US 720, 738, *supra,* quoting *Michelin Tire Corp.* v. *Wages,* 423 US 276, 293). In the absence of both or any evidence that the city's taxation scheme is discriminatory (*see, Washington* v. *United States,* 460 US 536, 542; *Memphis Bank & Trust Co.* v. *Garner,* 459 US 392, 397), the city's tax must be upheld.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

* * * * *

Judgment affirmed, with costs. Opinion by Judge Titone. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock Jr., and Bellacosa concur.

Decided February 19, 1987

APPENDIX B

Order of the Appellate Division

25903

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

Petitioner,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

Pursuant to Article 78 of the CPLR.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 20, 1986.

Present—

HON. FRANCIS T. MURPHY, Presiding Justice.
THEODORE R. KUPFERMAN
DAVID ROSS
E. LEO MILONAS
BETTY WEINBERG ELLERIN,

Justices.

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent dated March 15, 1984,

And this proceeding having been transferred by order of said court, entered on October 25, 1984 (Richard Wallach, J.), to this Court for review and determination,

Order of the Appellate Division

And said proceeding having been argued by George J. Marchese of counsel for petitioner, by Joseph V. Hamilton, Jr. of counsel for respondent, and a brief having been submitted by Security Pacific International Bank, PNC International Bank and BankAmerica International by Richard C. Pugh of counsel, as amici curiae; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed. Respondent shall recover of petitioner $75 costs and disbursements of this proceeding. The clerk is directed to enter judgment in favor of respondent, with costs.

ENTER:

HAROLD J. REYNOLDS
Clerk.

APPENDIX C

Findings of the City of New York, Department of Finance

CONTINENTAL BANK INTERNATIONAL
231 South LaSalle Street
Chicago, Illinois 60693

FINDINGS

Gennaro G. Columbus
Formal Referee
March 2, 1984

Audit Nos.: SFTX-26
LFTX-54FTX

E.I.N.: 36-3084835

Appearances:

For the City of New York—Department of Finance:

Jonathan Robin, Esq.
Departmental Counsel

For the Taxpayer:
John A. Garraty, Jr. and
John M. Callagy, Esqs.
c/o Kelly Drye & Warren, Esqs.
101 Park Avenue
New York, New York 10178

Facts, Issues, Conclusions, Decision:

FACTS:

Petitioner (Continental Bank International ("CBI")), filed New York City Financial Corporation Tax returns for the periods 9/1/80 to 12/31/80 and 1/1/81 to 12/31/81, indicating no taxes due. The Department of

Finance, upon audit, determined a tax deficiency for both periods. The deficiency determined for the period 9/1/80 to 12/31/80 a tax principal of $1,040,475.32. The deficiency determined for the period 1/1/81 to 12/31/81 a tax principal of $3,779,393.98.

The taxpayer filed timely petitions for hearing requesting a redetermination of tax for both periods. The petition for the earlier period was received by the Department of Finance December 7, 1982, while the petition for the latter period was received on January 3, 1983. A formal hearing to review such Notices of Determination was commenced on June 9, 1983.

The Petitioner is a corporation organized under section 25-A of the Federal Reserve Act, which has been codified at 12 U.S.C. Sec. 611-631 (the "Edge Act"). It is a wholly owned subsidiary of Continental Illinois National Bank and Trust Company. It received a permit to begin business dated August 21, 1980 from the Board of Governors of the Federal Reserve System. The Petitioner's "Articles of Association" indicate that its home office is to be located in Chicago, Illinois. Petitioners acknowledge that for the periods in question it was doing a banking business in New York City and that it maintained a branch office within New York City. (R., Pgs. 79, 80).

According to the testimony of Philip DeChiara, a vice-president of the Petitioner, Continental Bank International established the branch in New York City, as well as branches in Los Angeles, California, Miami, Florida and Houston, Texas in 1980, followed, in 1981, by the opening of additional branches in Seattle, Washington, Minneapolis, Minnesotta, Cleveland, Ohio, Philadelphia, Pennsylvania, San Francisco, California and Dallas, Texas. (R., Pg. 62). Prior to the incorporation of the Petitioner, its parent bank

owned three separately incorporated Edge Act Corporations with home offices in New York, Miami and Houston, respectively. Following the Petitioner's incorporation, Mr. DeChiara stated that the separately incorporated Edge Act Corporations owned by the parent bank were liquidated and dissolved as part of a reorganization of the parent's Edge Act activities. DeChiara testified that this reorganization was undertaken to obtain the benefits of changes made to Federal Reserve Board Regulation K in 1979 which permitted Edge Act Corporations to branch across state lines. (R., Pgs. 60, 61).

Issue Presented:

Is an Edge Act Corporation with its home office outside New York State subject to the New York City Financial Corporation Tax when it maintains a branch and is doing business in New York City?

STATUTES INVOLVED

NEW YORK CITY

Section R46-37.1 of the Administrative Code of the City of New York which imposes the Financial Corporation Tax, reads in pertinent part, as follows:

> "For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof, beginning on or after January first, nineteen hundred seventy-three."

Section R46-37.2, subdivision (a), so far as is pertinent, defines "Banking Corporation" to include:

> "every other corporation or association organized under the authority of the United States which is doing a banking business in the city"

Section R46-37.2, subdivision (b), defines the words "Banking Business" as follows:

> "The words 'banking business' as used in this section means such business as a corporation or association may be created to do under articles three, five, five-a, six, seven and ten of the banking law or any business which a corporation or association is authorized by such articles to do. However, with respect to a national banking association organized under the authority of the United States, a federal savings and loan association or a production credit association, the words 'banking business' as used in this section means such business as a national banking association, federal savings and loan association or production credit association, respectively, may be created to do or is authorized to do under the laws of the United States or this state."

FEDERAL

The Edge Act permits the formation of Federally-chartered corporations to provide banking services for international transactions. They can receive deposits in the United States related to foreign transactions, finance domestic production of goods and services for export, and invest in foreign banking and financial corporations. (12 U.S.C. Sec. 615).

Section 627 of the Edge Act provides as follows:

> "Any corporation organized under the provisions of Sections 611-631 of this title [i.e., the Edge Act

> provisions] shall be subject to tax by the State within which its home office is located in the same manner and to the same extent as other corporations organized under the laws of that State which are transacting a similar character of business. The shares of stock in such corporations shall also be subject to tax as the personal property of the owner or holder thereof in the same manner and to the same extent as the shares of stock in similar state corporations."

Regulation K is the Federal Reserve Board regulation which sets forth the rules governing the formation and conduct of Edge corporations. It was originally issued in 1920, one year after the Edge Act was enacted by Congress. The regulation did not permit Edge Corporations to open branches in the United States. Therefore, in order for a parent bank to have Edge Bank offices in several states, each office had to be separately incorporated in a home state and each corporation was subject to a minimum capitalization requirement of $2 million dollars. In 1978, the International Banking Act was passed, to improve the ability of United States banks to compete effectively in the field of international banking and finance. It directed the Federal Reserve Board to expand the powers and improve the competitive position of Edge Act corporations. Accordingly, the Board made numerous revisions to Regulation K in 1979, including enabling Edge corporations to establish branches across state lines. (12 C.F.R. Sec. 211.4 (c) (1980).

LEGAL ANALYSIS

In claiming exemption, the taxpayer contends that New York City is prohibited from imposing the Financial Cor-

poration Tax on the income of CBI's New York branch, or on the New York City branch office of any Edge Act bank having its home office outside New York State. The taxpayer contends this conclusion is required because, (1) under constitutional principles, states and municipalities may not tax federally chartered banks unless they have been specifically authorized to do so by Congress and, (2) the plain language and legislative history of Section 627 indicate that Congress has not authorized states other than the home state to tax Edge Act banks, but instead has prohibited such taxation, and (3) existing authorities interpreting Section 627 confirm the conclusion that states other than the home office state may not tax Edge Act banks.

1. *Federal Instrumentation Issue*

The taxpayer cites no Edge Act case that reached the Supreme Court to support its position. Instead, the taxpayer categorizes Edge Act banks as federal instrumentalities so as to incorporate itself with the holdings of *McCulloch* v. *Maryland,* 17 U.S. 159, 4 L. Ed. 579 (1819).

In *McCulloch* v. *Maryland,* Chief Justice John Marshall, writing for a unanimous Supreme Court, stated that it is unconstitutional under Article VI, Clause 2, of the Constitution of the United States (the "Supremacy Clause") for a state to impose a tax on the operations of an instrument lawfully employed by the United States Government to carry its powers into execution. The federal "instrument" in that case was the Second Bank of the United States, a federally chartered *national* bank, and the tax found unconstitutional in its application to this bank was a Maryland tax imposed upon banks not chartered by the state's legislature.

Findings of the City of New York, Department of Finance

The legal principle that has evolved from this landmark case is that *instrumentalities* of the Federal Government, in the absence of express Congressional consent, cannot be subject to state and local taxation. *United States* v. *County of Allegheny,* 322 U.S. 174, 177 (1943).

While the Supreme Court has ruled that national banks are tax-immune instrumentalities, *Agricultural National Bank* v. *Tax Commission,* 392 U.S. 339 (1968), it has never ruled on this issue with regard to "Edge Act" banks. And the fact that they are federally chartered (12 U.S.C. Secs. 611-631) should not be determinative for tax immunity purposes because there are numerous federally chartered organizations that are not instrumentalities of the Government and that are subject to state and local taxation in many jurisdictions and for varied types of taxes, without limitations or immunities. *Railroad Co.* v. *Peniston,* 85 U.S. 5, 21 L. Ed. 792 (1873); *Broad River Power Co.* v. *Query,* 288 U.S. 178.

Applying the test for ascertaining whether an institution is so closely related to governmental activity as to ascribe to it the status of a tax-immune instrumentality is difficult. Various formulations of the controlling test have been applied, e.g.:

(1) whether it has been so incorporated into the governmental structure as to become an instrumentality of the United States. *United States* v. *Boyd,* 378 U.S. 39, 48: 12 L. Ed. 2d 713 (1964);

(2) whether it is an arm of the Government deemed by it to be essential for the performance of governmental functions and serving as an integral part of a department of government in the fulfillment of duties entrusted to it. *Standard Oil Co.*

v. *Johnson,* 316 U.S. 481, 485, 86 L. Ed. 1611, 1615 (1942);

(3) whether it has been so assimilated by the Government as to become one of its constituent parts; *United States* v. *Township of Muskegon,* 355 U.S. 484, 2 L. Ed. 2d 436, 438 (1958);

Under these general holdings, the Court has looked to various specific factors and characteristics to determine the status of the specific institution, i.e., whether it is organized for private gain; whether the Government retained such control over it that it could properly be called a servant of the United States in agency terms; whether its organization was to effectuate a specific governmental program, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102, 86 L. Ed. 65 (1941); whether its ownership, substantially or totally, lies in the Government, *Clallem County* v. *U.S.,* 263 U.S. 341, 343, 68 L. Ed. 328, 330 (1923); *Railroad Co.* v. *Peniston,* at 32 supra; whether governmental officials handle and control its operations, *Standard Oil Co.* v. *Johnson,* supra; whether its officers or any significant portion of them are appointed by the Government, *Dept. of Employment* v. *U.S.* 385 U.S. 355; whether the government gives it significant financial aid; whether it is charged by law with carrying out some of the Government's international commitments; and whether it performs functions indispensable to the workings of a governmental unit, *Dept. of Employment* v. *U.S.,* supra, at 359, 17 L. Ed. 2d at 418.

With certain exceptions unimportant to the instant case, "Edge Act" banks are privately owned banks whose stock must be owned either by United States citizens or corporations. If owned by a corporation, the controlling interest must be owned by citizens of the United States and it must

be chartered under laws of the United States or law of a State of the United States. (12 U.S.C. Sec. 619).

Theoretically, Edge corporations may be organized by individuals and non-banking institutions; in practice they are owned by other banking institutions (*Travis* v. *National City Bank of New York,* 23 F. Supp. 363 (1938). The common motivation of these privately owned banks is profit making: the sale of banking products and services in connection with international trade transactions. The Federal purpose for their creation and regulation stemmed from the recognition that for international trade, expansion, and a quest for development of new markets for American goods, there was a corresponding need for non-discriminating credit financing for American exports in competitive foreign markets. Hence, Edge banks were created to serve as vehicles through which this end was to be achieved.

In the Senate debate before the Edge Act was enacted, Senator Edge in a speech in support of his bill stated:

> "Our banks at present are not in a position to finance foreign sales, and it is necessary * * * * that we supplement the banking system in this carefully protected manner." 58 Cong Rec. Parts 5 and 8.

Also relevant are excerpts from the House and Senate reports on the International Banking Act of 1978:

> "Subsection (b) amends the Edge Act to include a declaration of congressional policy which is to serve as guidance to future regulatory actions and interpretations by the Board of the Edge Act. The purposes set forth recognize the importance of establishing international banking facilities throughout the country in promoting international trade, espe-

cially U.S. exports; the need to foster Edge Act ownership by regional and smaller banks, in particular, to bring trade financing opportunities to small farms and business; to stimulate export opportunities and competition in international finance, the need to maintain competitive equality between Edge Act corporations and similar foreign-owned banking institutions in the United States and abroad; and the need to interpret the act in the light of changing economic conditions and banking environments, with a requirement that regulations be reviewed at least once every 5 years. *The emphasis is on financing exports; and that is where it should be in order to establish and maintain a sound U.S. trade position.*

Subsection (c) eliminates the requirement that all Edge Act corporation directors be U.S. citizens. This provision, in conjunction with subsection (f), will enable foreign-owned banking institutions to own Edge Act corporations, and in so doing will enable them to penetrate new trade markets in the United States. This should assist in the spread of international banking and finance facilities throughout the country, stimulating competition and new export opportunities.

* * * * *

Subsection (f) would modify the Edge Act to permit foreign-owned banking institutions to acquire majority stock control of such corporations. The present provision prohibiting such majority control dates from an earlier period when the Congress was concerned that U.S. banking organizations lacked the knowledge and wherewithal to compete with the

> great banking and trading houses of Europe. Such fears no longer reflect reality and the present provision serves only to restrict unnecessarily foreign bank entry into new international trade markets within the United States."
>
> (underscores provided: House and Senate Reports for H.R. 10899; 12 U.S.C. Sec. 619, as amended, September 17, 1978).

Given this background, it is incorrect to consider these international business banks as tax-immune instrumentalities of the United States merely because they are federally chartered, when in reality they are doing nothing more than what other State banks are permittted to do domestically.

2. *§ 627 of the Edge Act*

The Taxpayer's contention that the plain language and legislative history of Section 627 of the Edge Act means that Congress has not authorized states other than the home state to tax Edge Act banks is without support and without merit.

When the Edge Act was first enacted there was no provision for domestic branches in the law. Such banks were only authorized to establish branches in foreign countries, dependencies, or insular possessions of the United States for the furtherance of foreign commerce of the United States (12 U.S.C. 601). Hence, the issue of multistate taxation would have been academic in 1919.

When Congress desired to grant a complete exemption from all taxes for the Federal Reserve Banks, it clearly and unequivocally set it forth in no uncertain terms:

> "Federal reserve banks, including the capital stock and surplus therein and the income derived there-

> from, shall be exempt from Federal, State and local taxation, except taxes upon real estate." 12 U.S.C. Section 531.

When Congress enacted Section 41 of the National Banking Act of 1864 dealing with state taxation of national banks, and as this section has been subsequently amended (12 U.S.C. Sec. 548), it set forth specifically the type of taxes which states could impose with specific conditions and limitations prescribed therein.

When Congress enacted Section 627 of the Edge Act in 1919, it clearly intended taxation of Edge corporate income by the state in which the home office of the bank was located, but only on condition that it is taxed in the same manner and to the same extent as other corporations organized under the laws of that state transacting a similar character of business. At the time of this enactment (1919) there were no domestic branches of Edge Act banks authorized by Federal Reserve Board Regulation K, issued in 1920 pursuant to Section 615 of the Edge Act. Instead, branches or agencies of such banks were only permitted to be established on approval of the Board of Governors of the Federal Reserve System in foreign countries, and in dependencies or insular possessions of the United States. Therefore, in order for a bank to establish Edge corporate offices in several states each office was required to be separately incorporated within the state in which the bank sought to operate. It was through this procedure, that states had effective authority to tax an Edge Act bank located and incorported within its jurisdiction.

It was not until sixty years later, and as a result of major revisions of the International Banking Act of 1978 that domestic branches first appeared. The Board of Governors

of the Federal Reserve System, in the exercise of its broad powers pursuant to a general directive of the 1978 enactment, amended Regulation K in 1979 to allow Edge corporations to establish domestic interstate branches on prior approval of the Board of Governors, (12 C.F.R. Sec. 211.4(c), 1982, amending 12 C.F.R. Sec. 211.6(a), 1978).

Under the amended Regulation Section 211.4(a) in granting its approval for establishment of a domestic branch, the Board will consider the same factors as it does in reviewing a request for an Edge corporate charter, namely: the financial condition of the applicant, the character of its management, the need for the services and the effects of competition.

Such domestic branches, having been authorized by the Board of Governors without explicit delegation in the Congressional enactment, may be susceptible to constitutional attack on this account. Nonetheless, Edge corporations have expanded, the federal policy objective of promoting foreign trade has been furthered, and Congress has taken no affirmative step to modify the original language of Section 627 of the Edge Act with respect to any further pronouncements as to the tax status of Edge branches in states other than the home state. And there have not been any affirmative measures to repeal Section 627. Therefore, since domestic branches were not in existence when Section 627 was enacted, there could have been no legislative intent to exempt such branches and none should be implied nor read into a statute by implication in the absence of a clear and positive expression (McKinney's Statutes, Sec. 294). Moreover, where possible, tax statutes are to be construed to insure collection of all taxes (McKinney's Statutes, Sec. 313 (b)).

Moreover, even if Edge Act banks had been authorized by the original enactment to establish interstate domestic

branches, a literal reading of Section 627 would lead to the conclusion that the home state of an Edge bank can impose any tax upon such bank, provided there is a similar tax which it imposes to the same extent upon other corporations organized under the laws of such state which transact a similar business within such state. There is no mention of any state tax exemption for any Edge Act banking activities either within or without the home state. The only concern was that where a federally chartered Edge Act bank does business, under the long established dual banking system, there be no discriminatory tax scheme which would arbitrarily disfavor and impose a greater tax burden upon federally chartered banks. Under these circumstances, the words "it transacts business" might have been substituted for the words "its home office is located".

Section 627 does not contain any state tax exemption and none was intended. The use of the words "within which its home office is located" are not words of prohibition because in the original enactment no domestic branches existed, and if a bank wished to operate in more than one state, it could incorporate separate organizations to operate in other states of its choice and such organizations would be taxed in those home states, not as branches but as separate corporations.

A reading of the relevant debates on the floor of the Senate and House makes clear that the "home office" language was not meant to exempt Edge banks from State taxation. In fact, there are numerous statements by the legislators which indicate a specific intent that Edge corporations be subject to state and local tax in the same manner and to the same extent as other corporations. See: 58 Cong. Rec. 4969 (1919).

The taxpayer's further contention that Section 627 represents an expression of Congressional exercise of the

federal supremacy power under Article 6, clause 2 of the United States Constitution, and the imposition of an express statutory ban on state taxation of Edge Act banks is a self-serving conclusion without legal substantiation. The taxpayer points to no instance in the legislative process of Edge Act enactments wherein any legislative member stated that Edge Act corporations would be exempt from state taxation or that they may be characterized as tax-immune instrumentalities of the federal government. Moreover, the taxpayer's final conclusion proclaiming that any judicial decision on the issue in the matter at hand, by this administratve agency or the New York courts, would constitute an illegal assumption of a legislative function which would be violative of an essential element of governmental separation of powers is unacceptable, as is taxpayer's suggestion that the City of New York has an obligation to seek repeal of Section 627 of the Edge Act before it can assert a right to tax such banks that are doing business within the City.

CONCLUSION

On my examination of this entire record and all the legal arguments which have been presented, including the legislative background materials, it is clear that the purpose of Edge corporations as well as the manner in which they are organized and operate, are quite different from the objectives, purposes, operations and formation of national banks. Therefore, express Congressional permission for State/local taxation is unnecessary. I am likewise convinced that these federally chartered Edge corporations are not instrumentalities of the federal government but rather, they are privately owned corporations engaged in international financing of business transactions for profit. The fact that such organizations enhance the American export trade with

foreign countries, consistent with federal policy, is incidental and insufficient to justify a tax-immunity status since there is no performance of any governmental function and no justification for shielding such organizations from bearing their fair share of the costs of local governments wherein they receive services and economic benefits.

In its existing form, Section 627 is clearly language of an affirmative approval of state taxation, as was intended at the time of its enactment. The section has no words of exemption either expressed or implied. Accordingly, there is no Federal law or Constitutional barrier upon which this taxpayer can premise its claim for tax exemption or tax immunity.

DECISION:

Therefore, the City's tax assessments as updated for additional interest to January 15, 1984 are affirmed as follows:

Tax Periods	*Tax Principal*	*Interest*	*Total*
9/1/80-12/31/80	$1,040,475.32	$ 367,329.41	$1,407,804.73
1/1/81-12/31/81	3,779,393.98	888,130.64	4,667,524.62
Total	$4,819,869.30	$1,255,460.05	$6,075,329.35

Gennaro G. Columbus, Esq.

Continental Bank International (E.I.N. 36-3084835)
As successor in Reorganization to
Continental Bank International (E.I.N. 13-1968348)
231 South La Salle Street
Chicago, Illinois 60693

Findings of the City of New York, Department of Finance

Audit Nos. SFTX 26, LFTX-54 FTX
E.I.N. 36-30834835

By: John A. Garraty, Jr. and,
John M. Callagy, Esqs.
c/o Kelly, Drye & Warren
101 Park Avenue
New York, N.Y. 10178

/s/ GENNARO G. COLUMBUS
Gennaro G. Columbus
Formal Referee

Approved:

/s/ ROBERT KRAUT
Robert Kraut,
Director
Bureau of Hearings

APPENDIX D

Remittitur of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

The HON. SOL WACHTLER, *Chief Judge, Presiding*

In the Matter of
THE CONTINENTAL BANK INTERNATIONAL,

Appellant,

—v.—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent.

The appellant(s) in the above entitled appeal appeared by Sullivan and Cromwell, Esqs.; the respondent appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel, City of New York; the amici curiae appeared by Jo-Ann Horn, Esq.; Michael G. DeAngelis, Esq.; and Cleary, Gottlieb, Steen and Hamilton, Esqs.

The Court, after due deliberation, orders and adjudges that the judgment affirmed, with costs. Opinion by Judge Titone. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 19, 1987.

APPENDIX E

Notice of Appeal as Filed in the New York Court of Appeals on May 11, 1987

COURT OF APPEALS

STATE OF NEW YORK

New York County Clerk's Index No. 16365/84

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

Petitioner,

—against—

CITY OF NEW YORK, DEPARTMENT OF FINANCE,

Respondent,

Pursuant to Article 78 of the CPLR.

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1257 (2) petitioner Continental Bank International hereby appeals to the Supreme Court of the United States from the judgment of this Court entered herein on February 19, 1987 affirming the judgment of the Appellate Division, First Department, entered on February 20, 1986, and petitioner appeals from each and every part of said judgment as well as from the whole thereof.

Dated: New York, New York
May 8, 1987

/s/ SULLIVAN & CROMWELL
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Petitioner
Continental Bank International

Notice of Appeal

To:

CLERK OF THE COUNTY OF NEW YORK -

HON. PETER L. ZIMROTH
Corporation Counsel for the
City of New York
100 Church Street
New York, New York 10007
Attention of Joseph V. Hamilton, Jr., Esq.
Attorney for Respondent
City of New York,
Department of Finance

HON. ROBERT ABRAMS
Attorney General of the State of
New York
Attention of the Solicitor General
The Capital, Room 220
Albany, New York 12224

Certification of Service

The undersigned, an attorney duly admitted and licensed to practice before this Court and counsel for appellant Continental Bank International, hereby certifies pursuant to Rule 28.5 of the Supreme Court of the United States, that on May 8, 1987, he caused one copy of the within Notice of Appeal to be served by hand upon the only party required to be served, Respondent City of New York, Department of Finance at the office of its counsel Hon. Peter L. Zimroth, Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007, attention of Joseph V. Hamilton, Jr., Esq.

/s/ EDWARD W. KEANE
Edward W. Keane

SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

Copy of Notice of Appeal Filed in the Supreme Court of New York, New York County, on May 8, 1987

COURT OF APPEALS

STATE OF NEW YORK

New York County Clerk's Index No. 16365/84

In the Matter of the Application of
CONTINENTAL BANK INTERNATIONAL,

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Dated: New York, New York
May 8, 1987

/s/ SULLIVAN & CROMWELL
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(212) 558-4000
Attorneys for Petitioner
Continental Bank International

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To:

CLERK OF THE COUNTY OF NEW YORK

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Corporation Counsel for the
City of New York
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/s/ EDWARD W. KEANE
Edward W. Keane

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APPENDIX F

Relevant Constitutional, Statutory and Regulatory Provisions

ARTICLE VI, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TITLE 12 OF THE UNITED STATES CODE

§ 611. Formation authorized; fiscal agents; depositaries in insular possessions

Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in foreign countries, or in such dependencies or insular possessions as provided by this subchapter and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five: *Provided,* That nothing in this subchapter shall be construed to deny the right of the Secretary of the Treasury to use any corporation organized under this subchapter as depositaries in Panama and the Panama Canal Zone, or other insular possessions and dependencies of the United States.

The Congress declares that it is the purpose of this subchapter to provide for the establishment of international

§ 611a. Statement of purposes; rules and regulations

banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad; to afford to the United States exporter and importer in particular, and to United States commerce, industry, and agriculture in general, at all times a means of financing international trade, especially United States exports; to foster the participation by regional and smaller banks throughout the United States in the provision of international banking and financing services to all segments of United States agriculture, commerce, and industry, and, in particular small business and farming concerns; to stimulate competition in the provision of international banking and financing services throughout the United States; and, in conjunction with each of the preceding purposes, to facilitate and stimulate the export of United States goods, wares, merchandise, commodities, and services to achieve a sound United States international trade position. The Board of Governors of the Federal Reserve System shall issue rules and regulations under this subchapter consistent with and in furtherance of the purposes described in the preceding sentence, and, in accordance therewith, shall review and revise any such rules and regulations at least once every five years, the first such period commencing with the effective date of rules and regulations issued pursuant to section 3(a) of the International Banking Act of 1978, in order to ensure that such purposes are being served in light of prevailing economic conditions and banking practices.

[As amended Sept. 17, 1978, Pub. L. 95-369, § 3(c), 92 Stat. 608.]

§ 613. Signing of articles of association; forwarding to and filing by Board of Governors of the Federal Reserve System; organization certificate; contents

Articles of association described in section 612 of this title shall be signed by all of the persons intending to participate in the organization of the corporation and, thereafter, shall be forwarded to the Board of Governors of the Federal Reserve System and shall be filed and preserved in its office. The persons signing the said articles of association shall, under their hands, make an organization certificate which shall specifically state:

First. The name assumed by such corporation, which shall be subject to the approval of the Board of Governors of the Federal Reserve System.

Second. The place or places where its operations are to be carried on.

Third. The place in the United States where its home office is to be located.

Fourth. The amount of its capital stock and the number of shares into which the same shall be divided.

Fifth. The names and places of business or residence of the persons executing the certificate and the number of shares to which each has subscribed.

Sixth. The fact that the certificate is made to enable the persons subscribing the same, and all other persons, firms, companies, and corporations, who or which may thereafter subscribe to or purchase shares of the capital stock of such corporation, to avail themselves of the advantages of this subchapter.

§ 615. Powers of corporation

Each corporation organized as provided in sections 611 to 614 of this title shall have power, under such rules and

regulations as the Board of Governors of the Federal Reserve System may prescribe:

(a) Dealings in drafts, checks, bills of exchange, acceptances, and other evidences of indebtedness; purchase and sale of securities; letters of credit; purchase and sale of coin, bullion, and exchange; borrowing and loaning money; issue of debentures, bonds, and notes; deposits; limitation of liabilities; reserves

To purchase, sell, discount, and negotiate, with or without its indorsement or guaranty, notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to purchase and sell, with or without its indorsement or guaranty, securities, including the obligations of the United States or of any State thereof but not including shares of stock in any corporation except as herein provided; to accept bills or drafts drawn upon it subject to such limitations and restrictions as the Board of Governors of the Federal Reserve System may impose; to issue letters of credit; to purchase and sell coin, bullion, and exchange; to borrow and to lend money; to issue debentures, bonds, and promissory notes under such general conditions as to security and such limitations as the Board of Governors of the Federal Reserve System may prescribe; to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States; and generally to exercise such powers as are incidental to the power conferred by this Act or as may be usual, in the determination of the Board of Governors of the Federal Reserve System, in connection with the transaction of the business of banking or other financial operations in the countries, colonies, dependencies, or possessions in which it shall

transact business and not inconsistent with the powers specifically granted herein. Nothing contained in this subchapter shall be construed to prohibit the Board of Governors of the Federal Reserve System, under its power to prescribe rules and regulations, from limiting the aggregate amount of liabilities of any or all classes incurred by the corporation and outstanding at any one time. Whenever a corporation organized under this subchapter receives deposits in the United States authorized by this subchapter, it shall carry reserves in such amounts as the Board of Governors of the Federal Reserve System may prescribe for member banks of the Federal Reserve System.

(b) Branches or agencies

To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

(c) Purchase of stock in other corporations

With the consent of the Board of Governors of the Federal Reserve System to purchase and hold stock or other certificates of ownership in any other corporation organized under the provisions of this subchapter, or under the laws of any foreign country or a colony or dependency thereof, or under the laws of any State, dependency, or insular possession of the United States but not engaged in the general business of buying or selling goods, wares, merchandise, or commodities in the United States, and not transacting any

business in the United States except such as in the judgment of the Board of Governors of the Federal Reserve System may be incidental to its international or foreign business: *provided, however,* That, except with the approval of the Board of Governors of the Federal Reserve System, no corporation organized under this subchapter shall invest in any one corporation an amount in excess of 10 per centum of its own capital and surplus, except in a corporation engaged in the business of banking, when 15 per centum of its capital and surplus may be so invested: *Provided further,* That no corporation organized under this subchapter shall purchase, own, or hold stock or certificates of ownership in any other corporation organized under this subchapter or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation.

Nothing contained herein shall prevent corporations organized under this subchapter from purchasing and holding stock in any corporation where such purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired in corporations organized under this subchapter shall, within six months from such purchase, be sold or disposed of at public or private sale, unless the time to so dispose of same is extended by the Board of Governors of the Federal Reserve System.

[As amended Sept. 17, 1978, Pub. L. 95-369, § 3(c), 92 Stat. 609.]

§ 616. Place of carrying on business; when business may be begun

No corporation organized under this subchapter shall carry on any part of its business in the United States except

such as, in the judgment of the Board of Governors of the Federal Reserve System, shall be incidental to its international or foreign business: *And provided further,* That except such as is incidental and preliminary to its organization, no such corporation shall exercise any of the powers conferred by this subchapter until it has been duly authorized by the Board of Governors of the Federal Reserve System to commence business as a corporation organized under the provisions of this subchapter.

§ 625. Stockholders' meetings; books and records; reports; examination

Every corporation organized under the provisions of this subchapter shall hold a meeting of its stockholders annually upon a date fixed in its bylaws, such meeting to be held at its home office in the United States. Every such corporation shall keep at its home office books containing the names of all stockholders thereof, and the names and addresses of the members of its board of directors, together with copies of all reports made by it to the Board of Governors of the Federal Reserve System. Every such corporation shall make reports to the Board of Governors of the Federal Reserve System at such times and in such form as it may require; and shall be subject to examination once a year and at such other times as may be deemed necessary by the Board of Governors of the Federal Reserve System by examiners appointed by the Board of Governors of the Federal Reserve System, the cost of such examinations, including the compensation of the examiners, to be fixed by the Board of Governors of the Federal Reserve System and to be paid by the Corporation examined.

§ 627. State taxation

[Set forth at page 3.]

Relevant Statutes

REVISED STATUTES—SECTION 5219*

Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

§ R46—37.1 Imposition of tax.

(a) For the privilege of doing business in the city in a corporate or organized capacity, a tax, computed under section R46-37.5, is hereby annually imposed on every banking corporation for each of its taxable years, or any part thereof, beginning on or after January first, nineteen hundred seventy-three.

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* Act of February 10, 1868, c. 7, 15 Stat. 34, amending the Act of June 3, 1864, c. 106, § 41, 13 stat. 111. This statute was amended again in 1923, 1926 and 1969 and appears in its current formulation at 12 U.S.C. § 548.

Relevant Statutes

§ R46—37.2 Banking corporation defined; exempt corporations.

(a) For the purpose of this subpart, a banking corporation means:

* * *

(3) every national banking association organized under the authority of the United States which is doing a banking business in the city;

(4) every federal savings and loan association which is doing a banking business in the city;

(5) a production credit association organized under the federal farm credit act of nineteen hundred thirty-three, which is doing a banking business in the city and all of whose stock held by the federal production credit corporation has been retired;

(6) every other corporation or association organized under the authority of the United States which is doing a banking business in the city;

* * *

§ R46—37.3 Computations of entire net income.

(a) Entire net income means total net income from all sources which shall be the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, except as hereinafter provided.

* * *

§ R46—37.4 Allocation of entire net income.

If the taxpayer's entire net income is derived from business carried on both within and without the city, the portion thereof which is derived from business carried on within the city shall be allocated under rules and regulations prescribed by the finance administrator.

Relevant Statutes

REGULATION K (March 23, 1920)

VIII. Operations in the United States.

No corporation shall carry on any part of its business in the United States except such as shall be incidental to its international or foreign business. Agencies may be established in the United States with the approval of the Federal Reserve Board for specific purposes, but not generally to carry on the business of the Corporation.

X. Branches.

No Corporation shall establish any branches except with the approval of the Federal Reserve Board, and in no case shall any branch be established in the United States.